RECEIVED
OCT 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-488

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1980.

COMMONWEALTH OF MASSACHUSETTS
Petitioner,

v.

JEFFREY A. BRANT
Respondent.

REPLY OF THE RESPONDENT, JEFFREY A. BRANT TO THE COMMONWEALTH OF MASSACHUSETTS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT PURSUANT TO RULE 46 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES ADOPTED APRIL 14, 1980 EFFECTIVE JUNE 13, 1980.

Thomas P. McCusker, Jr.
Attorney for Respondent
805 High Street
Westwood, Massachusetts 02090
(617) 326-3500

NO. 80-488

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

COMMONWEALTH OF MASSACHUSETTS
Petitioner

v.

JEFFREY A. BRANT,
Respondent.

REPLY OF THE RESPONDENT, JEFFREY A. BRANT TO THE COMMONWEALTH OF MASSACHUSETTS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT PURSUANT TO RULE 46 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES ADOPTED APRIL 14, 1980 EFFECTIVE JUNE 13, 1980.

The Respondent, Jeffrey A. Brant, prays that a Writ of Certiorari not issue to review the judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1980) 1473, 406 N.E. 2d 1021. The opinion of the Appeals Court is reported at Mass. App. Ct. Adv. Sh. (1979) 2124, 395 N.E. 2d. 1320.

Statement of the Case.

The respondent was convicted of armed robbery while masked and sentenced to not less than eighteen years nor more than thirty years. Prior to trial he filed a motion to suppress statements as they were obtained in violation of his Constitutional rights. After a hearing, the motion was denied in part and the respondent excepted. A three judge panel of the Appeals Court found no error, however, Judge Brown, of that panel, filed a dissent to the majority opinion of the Appeals Court wherein he stated that he believed the Motion Judge misapplied the Constitutional standards to the fact finding process from the start. See Petitioner's Appendix B, pages 35 (a) through 54(a).

The defendant Brant then made application to the Supreme Judicial Court for leave to obtain further appellate review. This leave was granted and the Supreme Judicial Court reversed the judgment on the basis that all statements and admissions "should have been excluded as have been excluded as obtained in violation of his rights under the Fifth Amendment of the Constitution of the United States" Commonwealth V. Brant, Mass. Adv. Sh. (1980) 1473, 1484; 406 N.E. 2d 1021 (Petitioner's App. A).

Statement of Facts.

The Respondent, Jeffrey A. Brant, relies upon the findings of fact by Judge Young, who heard and decided the Motion to Suppress and filed Findings of Fact. They are appended hereto as Appendix A.

The Reasons for Denying Review.

I.

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts in the case of Commonwealth V. Jeffrey Brant follows settled Constitutional law in this area. The Supreme Judicial Court has followed the precepts set forth by decisions of the United States Supreme Court in Miranda V. Arizona, 384 U.S. 436 (1966), Michigan V. Mosley, 423 U.S. 96 (1975), and Rhode Island V. Innis, ___ U.S. ___ 100 S. Ct. 1689 (1980).

The Supreme Judicial Court of Massachusetts has also followed its own case law as set forth in Commonwealth V. Taylor, 78 Mass. Adv. Sh. 394; 374 NE. 2d 81 (1978).

II.

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts in the Brant case does not set forth a per se proscription against further questioning by the police once a defendant expresses a desire for an attorney but instead has followed the settled case law as set forth in the cases cited above.

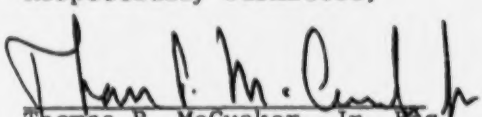
III.

It is the Respondent Brant's position that the decision of the Supreme Judicial Court in reversing Brant's conviction was not based on an application of Rhode Island V. Innis, ___ U.S. ___ 100, S. Ct. 1682 (1980) and it is further his position that the decision does not constitute a new constitutional rule of criminal procedure and further the petitioner's argument of retroactive application need not be considered by the Court.

Conclusion.

For the reasons stated above the respondent, Jeffrey A. Brant, submits that a Writ of Certiorari should not be granted.

Respectfully submitted,



Thomas P. McCusker, Jr., Esq.
805 High Street
Westwood, MA 02090
(617) 326-3500

APPENDIX A.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
Nos.
71176-82

COMMONWEALTH

V.

NEIL H. KAMPEN, JR.

and

JEFFREY BRANT

FINDINGS, RULINGS and ORDER on DEFENDANTS' MOTIONS TO SUPPRESS

The defendants, Neil H. Kampen, Jr., and Jeffrey A. Brant, have each raised motions to suppress the various inculpatory statements which they made while in the custody of Florida or Massachusetts officials.

After a voir dire hearing, at which both defendants testified, the Commonwealth called Deputy Sheriff Hudepohl and Norwood Police Detectives Casey and Fruci in rebuttal, and the parties introduced twenty (20) exhibits, I make the following findings and rulings:

The defendants were arrested in Titusville, Florida, after a high-speed automobile chase which involved the exchange of gunfire. Kampen's apprehension took place at approximately 7:00 a.m. on February 4, 1978. The defendants claim that they were physically assaulted by the arresting officers; but I do not so find, concluding rather that the police used only such force as was necessary to apprehend the fleeing defendants Kampen and Brant.

Kampen was booked at 9:30 a.m. and Brant, who had eluded his pursuers somewhat longer, was booked at 2:10 p.m. During the booking procedures, each was informed of his Miranda rights and each was specifically asked whether he wished to call the Public Defender. Kampen said only that he would see the Public Defender in court that morning, while Brant requested and was permitted to call the public defender.

On Sunday, February 5, 1978, both Kampen and Brant were brought into court for a proceeding which, the parties stipulated, involved the setting of bail and a probable cause hearing on certain Florida charges. Brant concedes that he was offered an attorney at that time; but both deny that any attorney was present, representing them

at that hearing. I find to the contrary, inferring from the Court records that the Florida Public Defender appeared at the February 5 hearing and represented Kampen and Brant (as well as others apprehended at the same time).

Following this hearing Kampen and Brant were held in custody at the Brevard County Jail, one of a complex of buildings in the County seat, which included the Sheriff's Office and, across the street, the courthouse. Kampen and Brant were held in separate cell blocks, each of which housed approximately eight prisoners. The prisoners in each block could talk with each other, but apparently could not communicate with prisoners held in other cell blocks. Thus Kampen and Brant could not converse with each other. Other prisoners were housed in each of the cell blocks occupied by Kampen and Brant. And I infer that each of the defendants were told, in the "scuttlebutt" of the jail, that if they were convicted and sent to one of Florida's State Prisons they would be subject to homosexual assaults.

On February 13, 1978, the Florida Public Defenders' Office was relieved by Court Order from representing Kampen and Brant due to a conflict of

interest between these defendants and a juvenile apprehended with them. On that same day, Assistant District Attorney Arthur Tiernan telephoned Hudepohl and requested that he seek to interview Kampen and Brant concerning the incident which is the subject of the present indictments.

On February 14, 1978, Hudepohl arrived at the courthouse Sheriff's Department-Jail complex, left his police car for some maintenance work, and proceeded to the jail. He arrived sometime shortly before 10:00 a.m. and asked to have Kampen and Brant brought to him. Kampen arrived first and was taken by Hudepohl into a small interview room adjacent to the main control room of the jail. He first informed Kampen that he wished to interview him concerning certain Massachusetts offenses and told him that Tiernan had called, and said that he wanted Kampen's side of the story. Hudepohl cautioned Kampen that he would not inquire about the Florida charges and carefully read him his Miranda rights, assuring after each question that Kampen understood. Hudepohl then asked Kampen, "Do you wish to talk with me now without a lawyer?" And Kampen said, "Yes." Kampen proceeded to give Hudepohl an inculpatory statement which,

when transcribed, covered six pages.

I find that, at the time Kampen first spoke with Hudepohl, he was calm and collected and quite familiar with his Miranda rights, not only from his Florida experiences, but from earlier occasions on which those rights had been read to him. I also find that his will was not overborne by the circumstances of his incarceration nor his concern over the results of conviction in Florida; and I find that he knowingly, intelligently and voluntarily waived his Fifth Amendment rights guaranteed under Miranda and its progeny and his Sixth Amendment right to have his attorney present.

Upon completion of the interview Hudepohl and Kampen left the interview room and Kampen was permitted to speak briefly with Brant in the main control room. Hudepohl next informed Tiernan of Kampen's incriminating statement; and Tiernan promptly secured complaints against Kampen in the District Court of Northern Norfolk for armed robbery, while masked, and assault with intent to murder. Tiernan and Detectives Fruci and Casey then left for Florida.

On the morning of February 15, 1978, Hudepohl returned to the Brevard County Jail with Kampen's earlier taped statement, now transcribed; and Kampen still appearing calm and cooperative, signed the six-page statement before a Notary. Later that morning, Kampen and Brant were taken to the courthouse where new counsel were appointed to represent each of them; and they were arraigned on the Florida charges. District Attorney Tiernan and Officers Casey, Fruci and Hudepohl were in court during the arraignment of the defendants and knew that they were represented by counsel, Attorney Norwich having been appointed for Kampen and Attorney Cossaboom having been appointed for Brant. Further, the Massachusetts authorities and Hudepohl, by that time had formed the intention to interrogate Brant later that day.

After their arraignment, Kampen and Brant were returned to jail; and later that afternoon they were brought into the jail interview room where Tiernan, Casey, Fruci and Hudepohl had assembled. At 4:57 p.m. Hudepohl turned on his tape recorder and began to read Brant his rights from a document entitled, "Brevard County Sheriff Department Interrogation Preamble," (Exhibit 11).

This form, quite properly in view of the fact that Brant had already had an attorney appointed to represent him, asks specifically, "Are you willing to proceed without an attorney being present to represent you?" This question is followed by a blank space for the answer of the person being interviewed. When Hudepohl read this question to Brant, Brant replied, "No." Hudepohl wrote this response on the form and confirmed that Brant refused to answer any further questions without his counsel being present. One of the Massachusetts authorities then interjected the fact that Kampen had already made a statement to the police; and Hudepohl confirmed to Brant that this was so and that Kampen's statement had already been signed and notarized. Hudepohl then turned off the tape recorder.

Kampen remarked that his statement was "all lies;" and Brandt asked for a moment to speak with Kampen privately. He was afforded this privilege. Fourteen minutes after the interrogation had ceased, Brandt and Kampen returned to the interview room and Brandt asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied, directing Brandt's attention to the

interrogation preamble, specifically the question of Brandt's willingness to proceed without an attorney being present to represent him. Brandt himself crossed out the response, "No," wrote in "Yes," and signed his name, indicating his willingness to give a statement without his attorney being present. Brandt indicated that he had changed his mind about giving a statement of his own free will, without any threats or promises.

Although Brandt stated he wished to make a statement, further proceedings followed a question and answer format, Hudepohl asking Brandt certain questions and Brandt responding. At one point Kampen volunteered a response when Brandt hesitated, or seemed uncertain; and one of the Massachusetts authorities commenced following up Kampen's response. Hudepohl then specifically reminded Kampen of his Miranda rights, ascertained that Kampen understood those rights, and asked him expressly, "In light of all that, do you still wish to talk to us without having an attorney here, or your attorney of record here in Brevard County?" Kampen responded, "Yeah."

Thereafter both Brandt and Kampen were asked further questions and responded thereto. Both Kampen's during the course of interrogation, the statements made by the person in custody cannot, over his objections, be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary Michigan v. Mosley, 423 U.S. 98, 99-100 (1975). See Michigan v. Tucker, 417 U.S. 433, 443 (1974).

The first issue of concern is the length of time these defendants were held in custody prior to their making the incriminating statements at issue. While an unreasonably lengthy detention without the authorities from claiming that they "scrupulously honored" the rights of a suspect, (See Michigan v. Mosley, 423 U.S. 115,119 N6 (Brennan, J., dissenting), this is not such a case. There is no suggestion that the timing of the defendants' interrogations related in any way to their court appearances or that the Florida Court appearances were delayed until such time as Hudepohl might question Kampen; nor is there any suggestion that either defendant was prevented from communicating with his attorney at any time. Indeed, the Titusville Police afforded both the

defendants the opportunity to communicate with the Office of the Public Defender; and Brandt availed himself of that opportunity. The length of time in custody which elapsed prior to the questioning here does not, standing alone, warrant suppression of these statements.

Brandt, however, argues strenuously that his right to cutoff questioning was not "scrupulously honored." He points out that when he indicated that he did not wish to respond to questions in the absence of his attorney, he was at once reminded that his compatriot Kampen had given a signed statement to the police. That this comment was not without significance to the parties at that juncture is evidenced by the fact that Kampen immediately denied the veracity of his statement.

I find that the police, in permitting Brandt to speak with Kampen, hoped and expected that Brandt would change his mind and make a statement. (See U.S. v. Olof, 527 F2d 52, 754 (1975). Recognizing that Michigan v. Mosley does not establish a per se proscription against further questioning after a suspect has exercised his right to cut off interrogation, Brandt nevertheless

argues that, on the authority of Commonwealth v. Taylor, Mass. Adv. Sh. (1978) 394, 400-407, the brief interval between interrogations (14 minutes), the fact that the second statement was about the same crime and was given to the same interrogators as were present during the first interrogation, when coupled with the fact that Brandt's appointed counsel, known to the authorities, was not present, requires suppression of the second statement. See U.S. v. Clayton, 407 F. Supp. 204, 206-207 (E.D. Wisc. (1976). The Commonwealth counters, urging that since questioning was stopped promptly upon the exercise by Brandt of his rights, and since no further questioning of any sort took place until after Brandt himself expressed the desire to make a statement, after a break during which he consulted with someone other than the interrogators, Brandt's second statement ought not to be suppressed, under the Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1663.

The question is a close one. Both Taylor and Watkins depend upon a close reading of Michigan v. Mosley. The focus of the majority opinion in Michigan v. Mosley seems to be on reviewing police conduct which, if faulty, would appear to prevent

further questioning; that is, if the police failed to scrupulously honor a suspect's right to cut off questioning, further interrogation after a break can be viewed as an effort to wear down the suspect's resistance and make him change his mind (Michigan v. Mosley at 105-106). At the same time, the Court characterized as "wholly irrational" a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of circumstances" (Michigan v. Mosley, at 102). As I discern it, therefore, the teaching of Michigan v. Mosley, as expressed in Taylor and Watkins, is that, once a suspect has exercised his right to cut off questioning, the police must "scrupulously honor" that decision and must cease interrogation on that charge or that line of inquiry for some indefinite period of time; but that the suspect may himself choose to initiate further interrogation. Thus the suspect has it wholly within his control to decline to answer any further questions or to initiate further inquiry if he determines his interests are best served by so doing.

As in Watkins, I find that, once questioning of Brandt had initially ceased, the police did not further solicit him or apply any coercion or pressure on him, and I hold that in these circumstances Brandt's spontaneous declaration of his desire to make a further statement constituted an implied, if not expressed (See PP. 1-2 of Exhibit 10) waiver of his previously asserted desire to speak with counsel, which waiver is permitted under the Miranda and the Mosley decisions. Commonwealth v. Watkins at 1663, but see U.S. v. Jakakas, 423 F. Supp. 564, 566-567 (E.D.N.Y. 1976).

I rule that adequate Miranda warnings were given prior to taking any of the incriminating statements in question; that the defendants' rights to cut off questioning were "scrupulously honored;" and that in view of my finding of voluntariness there appears no reason why any of the statements in question ought to be suppressed on Fifth Amendment grounds.

2. The Defendants' Sixth Amendment Rights.

The defendants next argue that their Sixth Amendment right to counsel was violated by their interrogation in the absence of counsel following counsel's appointment to represent them. The

defendants rely most heavily on Brewer v. Williams, U.S. (19-7) 45 USLW 4287. The defendants argue, and I agree, that their right to counsel attached at least as early as the February 5th probable cause hearing in the Florida Court. See Argersinger v. Hamlin, 40 7 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

Adversary proceedings had then commenced against the defendants in Florida; and I reject any formalistic notion that the appointment of Florida attorneys on the Florida charges did not, at that time, call into play the defendants' rights to counsel on the Massachusetts charges as well. It is the essence of the attorney-client relationship that the client will reveal to the attorney, whatever the scope of his original engagement, ought have a complete background upon which to counsel his client. The proscription of DR7-104 (A) (1), and "ethical consideration" EC7-8 seem to me to require such an interpretation. Thus, in ascertaining Sixth Amendment rights I rule that the appointment of counsel on the Florida charges is the equivalent of the appointment of counsel on all pending charges against these

against these defendants; and that, thereafter, adversary proceedings having commenced against these defendants in Florida, they have a right to legal representation when the government interrogates them, Brewer v. Williams, 45 USLW, at 4291; and that "waiver requires not merely comprehension but relinquishment" (Brewer v. Williams, 45 USLW, at 4294). It is not enough, therefore, to simply read to a suspect his Miranda rights, thus reminding him of his right to the assistance of counsel. After Brewer, the correct rule, as I perceive it, requires further that the suspect expressly or implicitly indicate that he wishes to proceed with the questioning without his counsel being present. See U. S. v. Monti, 557 F. 2d 899, 904 (First Cir. (1977). (Suspect's derogatory comments about his counsel established his desire to go forward without counsel present).

In the instant case Hudepohl, in accordance with what appears to be a quite proper Brevard County practice, carefully and repeatedly asked both Brandt and Kampen expressly whether they wished to proceed without counsel present. Indeed,

on February 15, 1978, when Kampen began volunteering information during the interrogation of Brandt, Hudepohl stopped the proceedings and, among other things, asked him specifically whether "You still wish to talk to us without any attorney here or your attorney of record here in Brevard County." It is difficult to see how Hudepohl could have called more forcefully to Kampen's attention his right to have his appointed attorney present.

Despite Hudepohl's care, however, certain portions of the joint Brandt-Kampen statement (Exhibit 10) must be suppressed because no express or implicit waiver of counsel's assistance was obtained. Specifically, the answers provided by Kampen on pages 14 and 15 of Exhibit 10, which were volunteered prior to Hudepohl re-reading Kampen's rights to him and obtaining an express waiver of counsel's presence must be suppressed. For the same reason the affidavits of Kampen and Brandt attached to Exhibit 10 as well as their initials on each page must be suppressed. These affidavits were executed and the initials affixed on February 17, 1978, when the transcribed statement was given to both defendants for review and signature.

The Commonwealth has failed to show that Kampen and Brandt expressly or implicitly waived their right to the assistance of counsel at the time they executed these affidavits and initialed the joint statement. Since the statement is a joint one and the affidavits indicate that each defendant adopts and admits as true and correct the admissions of the other, I rule that the signing and initialing on the morning of February 17 was a re-interrogation, inadmissible in evidence absent an express or implicit waiver of the assistance of counsel.

Of course, suppression of the affidavits and initials does not mean that the 20-page transcript itself is to be suppressed. Save for the remarks of Kampen on pages 14 and 15 thereof, it is not. Nor does this partial suppression permit the defendants at trial to raise any inference with the jury that the joint statement was not, in fact, reviewed and signed. Should any such inference be suggested, it will be open to the Commonwealth to introduce the affidavits and initials for impeachment purposes since the suppression of the affidavits and initials "cannot be perverted into a license to use

perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (Harris v. New York, 401 U.S. 222,226 (1977), (Dissenting opinion of Brennan, J.); Commonwealth v. Harris, 364 Mass. 236, 239 (1973).

The statements given by Kampen and Brandt to Detective Casey on the way to the airport must also be suppressed since the Commonwealth has failed to prove that the defendants expressly or implicitly waived their right to the assistance of counsel at the time of that interrogation. The Commonwealth introduced credible evidence that Casey properly read to the defendants their Miranda rights from his Miranda card before discussing the substance of the offenses with them; but, unfortunately, the Miranda card was not introduced in evidence as suggested in Commonwealth v. Preston, 359 Mass. 268, 372 N.2 (1971). See Commonwealth v. Howard, Mass. App. Ct. Adv. Sh. (1976) 866,868 n.3.

Miranda cards differ. The one carried by Officer Hudepohl and introduced in evidence (Exhibit 16) poses as its final question: "Do you wish to talk with us now without a lawyer?" Perhaps Officer Casey's card includes the same statement. Unfortunately, we do not know; and,

in the absence of sufficient evidence that the defendants, not merely comprehended their Sixth Amendment Right, but relinquished it, the statements to Officer Casey must be suppressed. (Brewer v. Williams, U.S. 45 USLW 4287, 4292.)

It follows that Kampen's motion to suppress must be allowed to the extent of suppressing his responses on page 14 and 15 of the transcript (Exhibit 10) and his signed affidavit and initials affixed thereto. His inculpatory statements to Officer Casey on the way to the airport are also suppressed. His motion is otherwise denied. Brandt's motion to suppress likewise is allowed to the extent of suppressing his affidavit attached to Exhibit 10 and his initials on each page thereof, as well as his inculpatory statements to Officer Casey on the way to the airport. His motion is otherwise denied.

BY ORDER OF THE COURT

_____
Justice of Superior Court

Entered: August 3, 1978

RECEIVED & FILED
AUG. 4, 1978
CLERK OF THE COURTS
NORFOLK COUNTY